Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-77

IN THE MATTER OF THE APPLICATION OF HOWARD J. O'BRIEN, JR., as EXECUTOR OF THE ESTATE OF HOWARD J. O'BRIEN, Deceased, and F. STUART O'BRIEN,

Petitioners-Appellants,

— *vs* —

CITY OF SYRACUSE, ERNEST W. SPEACH, COMMISSIONER, and SYRACUSE URBAN RENEWAL AGENCY, JOHN W. HILDEBRANDT, ASSISTANT SECRETARY,

Respondents-Appellees.

ON APPEAL FROM NEW YORK STATE COURT OF APPEALS

MOTION OF APPELLEES TO DISMISS APPEAL

DAVID M. GARBER, ESQ.
Corporation Counsel
Attorney for Respondents-Appellees

James L. Gelormini, Esq.
Eleanor Theodore, Esq.
Of Counsel

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Appellees move this Court to dismiss the appeal herein on the following grounds:

(1) the appeal is not taken in conformity with 28 U.S.C. 1257(2); and

(2) the appeal does not present substantial federal questions.

Since this Court may treat the papers of a case, not properly before it by appeal, as a petition for a writ of certiorari, Appellees further request that a writ be denied because no substantial federal questions are present for this Court to review.

FACTS

This case is an appeal from a judgment of the New York State Court of Appeals which dismissed Appellants' appeal to that court upon the ground that no substantial constitutional question was directly involved. (Jurisdictional Statement, page two)

The Appellants were owners of certain commercial properties located within an Urban Renewal Plan Area. Many parcels within this Area were acquired by Appellees and, after long negotiations with Appellants, Appellees offered to purchase their property for $210,000.00. However, the United States Department of Housing and Urban Development ("H.U.D.") disapproved the payment of such a sum and neither H.U.D. nor the Common Council of the City of Syracuse decided to institute condemnation proceedings to acquire the property.

Appellants thereafter commenced this action and attempted to prove a "de facto" taking of their property in violation of the Fifth Amendment to the Constitution. Following a trial in New York State Supreme Court Appellants' complaint was dismissed for failure to prove a prima facie case as a matter of law and the dismissal was affirmed, on the law and the facts, by the Appellate Division of Supreme Court. At the trial Appellants presented many acts which they alleged constituted a "taking" by the Appellees. Both the trial court and the Appellate Division considered each of these claims and rejected them (Jurisdictional Statement, page A10) and thereafter the New York Court of Appeals dismissed Appellants' appeal to that court.

POINT I

APPELLANTS' APPEAL IS NOT PROPERLY WITHIN THIS COURT'S JURISDICTION.

Title 28 U.S.C. 1257(2) provides that state court judgments may be reviewed by this Court

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> (2) by appeal, where is drawn into question the validity of any statute of any state on the grounds of its being repugnant to the Constitution.

Although Appellants rely on this section to support jurisdiction in this Court, the statutes listed in their jurisdictional statement were not relied on or even mentioned by the state courts below in their decisions. The courts below did not hold the statutes valid or invalid against constitutional attack because Appellants never attacked the constitutionality of these statutes below. The case at bar presented a factual question: whether Appellees' actions constituted a "de facto" taking of Appellants' property.

Accordingly, this Court is without jurisdiction under 28 U.S.C. 1257(2) to review by appeal the judgment of the New York State Court of Appeals.

POINT II

THERE ARE NO SUBSTANTIAL FEDERAL QUESTIONS PRESENTED AND CERTIORARI SHOULD NOT BE GRANTED.

Appellants request this Court to detail the standards for determining what governmental acts constitute a "taking" under the Fifth Amendment to the Constitution. However, this court has considered this issue on many prior occasions and it has held that there is no prescribed formula to determine when a "taking" occurs. *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed.2d 130; *Smyth* v. *Ames*, 169 U.S. 466, 18 S. Ct. 418, 42 L. Ed. 819. Of necessity, this court has formulated broad guidelines.

> This case and many others reveal the difficulty of drawing the line between what destructions of property by lawful governmental actions are compensable "takings" and what destructions are "consequential" and therefore not compensable. (citations omitted)
> *Armstrong* v. *U.S.*, 364 U.S. 40, 80 S. Ct. 1563, 5 L. Ed. 2d 1554

It has been held that governmental acts which do not directly encroach on private property but which may impair its use do not entitle an owner to compensation. *Northern Transport Co.* v. *Chicago*, 99 U.S. 635, 25 L. Ed. 336; *Gibson* v. *U.S.*, 166 U.S. 269, 17 S. Ct. 578, 41 L. Ed. 996. And, this court has held that the character of the invasion of private property and not the resulting damages, determine what acts constitute a "taking". *U.S.* v. *Cress*, 243 U.S. 316, 37 S. Ct. 380, 61 L. Ed. 746.

In fact, this Court has noted that a reduction in the value of an owner's property as a result of valid governmental acts is a risk of ownership.

> A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a "taking" in the constitutional sense. *Danforth* v. *U.S.*, 308 U.S. 271, 285

The decisions of the courts of New York and in the matter at bar are in accord with the decisions of this Court. In *City of Buffalo* v. *Clement*, 28 N.Y.2d 241, the landmark New York case, the Court of Appeals followed the decisions of this court and established the rule that, absent the most "obvious injustice", a physical invasion or direct legal restraint is necessary to establish a "de facto" taking.

The Appellate Division decision in the case at bar followed *City of Buffalo* v. *Clement* and further stated that even if appellant's allegations were conclusively proven ". . . they would not, taken cumulatively, constitute the dominion and control necessary to establish a de facto taking." (page A11 Jurisdictional Statement)

Appellants' alleged federal question is, in fact, a request to this Court to review the facts found below and determine that a "taking" has occurred. This is not a proper case for the exercise of this court's discretion to independently analyze the findings of the state courts below. *Pennekamp* v. *State*, 328 U.S. 331, 66 S. Ct. 1029, 90 L. Ed. 1295.

The record as a whole reveals no compensable "taking" under any theory heretofore adopted by this court. As the previous discussion of this court's decisions indicates reduction in the value of property by reason of governmental acts which do not directly limit the use of property and which do not effect dominion and control over the property are not "takings" in the constitutional sense. These reductions in value are, at most, "consequential" and must be accepted as one of the incidents and risks of ownership. *Danforth* v. *U.S.*, supra; *Gibson* v. *U.S.*, supra; *Armstrong* v. *U.S.*, supra; *U.S.* v. *Cress*, supra.

This Court has formulated the guidelines Appellants request. Upon applying those guidelines to this case it is clear the facts do not establish any de facto or other "taking" nor present substantial federal questions.

POINT III

APPELLANTS' APPEAL SHOULD BE DISMISSED AND CERTIORARI DENIED WITH COSTS.

Respectfully submitted,

DAVID M. GARBER, ESQ.
Corporation Counsel
Attorney for Respondents-Appellees
300 City Hall
Syracuse, New York 13202
(315) 473-6743

James L. Gelormini, Esq.
Eleanor Theodore, Esq.
Of Counsel